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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

OSWALDO BENITO VIDRIO,

Defendant and Appellant.

F062468

(Super. Ct. No. F09907198)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. James Petrucelli, Judge.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Poochigian, J. and Franson, J.

On February 11, 2010, an information was filed in Fresno County Superior Court, charging defendant Oswaldo Benito Vidrio with unlawfully driving or taking a motor vehicle with three prior theft convictions involving a vehicle (Veh. Code, § 10851, subd. (a); Pen. Code,[1] § 666.5; count 1), receiving a stolen motor vehicle with three prior theft convictions involving a vehicle (§§ 496d, subd. (a), 666.5; count 2), possessing a hypodermic needle or syringe (former Bus. & Prof. Code, § 4140; count 3), and being an unlicensed driver (Veh. Code, § 12500, subd. (a); count 4).[2] It was further alleged he was previously convicted of making criminal threats (§ 422), which constituted a serious or violent felony for purposes of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and that he served three prior prison terms (§ 667.5, subd. (b)). On November 9, 2010, following a jury trial, defendant was convicted of counts 1, 3, and 4, and acquitted of count 2. He admitted the prior conviction, strike, and prison term allegations.

On March 24, 2011, defendant was sentenced to a total of 11 years in prison, and ordered to pay various fines, fees, and assessments.[3] He was awarded 252 days of actual credit, plus 126 days of conduct credit, for a total of 378 days, computed pursuant to section 4019. He now says he is entitled, pursuant to the equal protection clauses of the federal and state Constitutions, to additional custody credits under sections 2933 and 4019, as amended operative October 1, 2011. We disagree.

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1 Further statutory references are to the Penal Code unless otherwise stated.

2 The facts of the offenses, which occurred December 29, 2009, are not pertinent to this appeal.

3 The legislative and initiative versions of the Three Strikes law were both amended by voter initiative, effective November 7, 2012. As the amendments affect only those individuals with two or more prior serious and/or violent felony convictions (see §§ 667, subd. (e)(2)(A) & (C), 1170.12, subd. (c)(2)(A) & (C), 1170.126, subd. (a)), they do not impact defendant.

DISCUSSION

Defendant's prior conviction for making criminal threats constituted a serious felony pursuant to section 1192.7, subdivision (c)(38). At the time he committed his current offenses, section 2933 dealt with worktime credits awarded to prisoners in the custody of the Director of Corrections, i.e., state prison. (§ 2933, former subd. (a), as amended by Stats. 1996, ch. 598, § 2.) Under section 4019, prisoners were entitled to presentence credits in an amount such that six days were deemed to have been served for every four days spent in actual custody. (§ 4019, former subds. (b), (c) & (f), as amended by Stats. 1982, ch. 1234, § 7.) At the time defendant was convicted and sentenced, he was still entitled to credits in an amount such that six days were deemed to have been served for every four days spent in actual custody. (§ 4019, subds. (b)(2), (c)(2) & (f), as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010; see also § 2933, former subd. (e), added by Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 38, eff. Jan. 25, 2010.)[4] Defendant was awarded credits calculated by means of this formula.

After defendant was sentenced, but while his appeal was pending, section 2933 was amended to delete references to section 4019 and calculation of presentence credits. (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.) Subdivision (b) of section 2933 now provides, in pertinent part: "For every six months of continuous incarceration, a prisoner shall be awarded credit reductions from his or her term of confinement of six months." Subdivision (e) of the statute now deals with forfeited credit. Subdivision (f) of section 4019 now provides: "It is the intent of the

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[4] Sections 2933 and 4019 were amended, effective September 28, 2010, with respect to crimes committed on or after that date. These versions of the statutes retained the six-days-for-four-days formula for defendants committed for a serious felony. (§§ 2933, former subd. (e)(1) & (3), as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010; 4019, former subds. (b), (c) & (f), as amended by Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010, & (g), added by Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010.)

Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody." (§ 4019, subd. (f), as amended by Stats. 2011, ch. 15, § 482, eff. Apr. 4, 2011, operative Oct. 1, 2011, & Stats. 2011, ch. 39, § 53, eff. June 30, 2011, operative Oct. 1, 2011.) Thus, section 4019 now provides for day-for-day credits for all defendants — including those with prior serious felony convictions — who serve presentence time in county jail. The only exceptions are defendants with current violent felony or murder convictions. (§§ 2933.1, 2933.2; see *People v. Nunez* (2008) 167 Cal.App.4th 761, 765.)[5]

Defendant now contends he is entitled to presentence custody credits calculated pursuant to current sections 2933 and 4019. As an initial matter, we do not believe we can properly make any determination with respect to calculation under section 2933 at this juncture. The California Department of Corrections and Rehabilitation (CDCR) is the entity charged with calculating a prisoner's credit under that statute. (*In re Pope* (2010) 50 Cal.4th 777, 780, 781; see *People v. Brown* (2012) 54 Cal.4th 314, 321, fn. 8, 322-323, fn. 11 (*Brown*); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1441; *In re Tate* (2006) 135 Cal.App.4th 756, 759-760.) An assertion the CDCR violated section 2933 by failing to award additional credits does not identify an error in the judgment on review; rather, "[s]uch a claim must logically be brought in a petition for habeas corpus against the official empowered to award such credits, namely the Director of the CDCR." (*Brown*, *supra*, 54 Cal.4th at p. 323, fn. 11.) In any event, the parties implicitly assume the analysis with respect to section 2933 would be the same as the analysis with respect to section 4019. Accordingly, we confine our discussion to the latter statute.

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5 Both the legislative and initiative versions of the Three Strikes law contain credit-limiting provisions. (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5).) These limits are "inapposite to precommitment credits, i.e., credits awarded prior to commitment to prison. [Citation.]" (*People v. Caceres* (1997) 52 Cal.App.4th 106, 110.)

Defendant recognizes the statutory changes from which he seeks to benefit expressly "apply prospectively and … to prisoners who are confined to a county jail … for a crime committed on or after October 1, 2011," while "[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).) He argues, however, that prospective-only application violates his right to equal protection under the federal and state Constitutions.

In *People v. Ellis* (2012) 207 Cal.App.4th 1546 (*Ellis*), we recently held the amendment to section 4019 that became operative October 1, 2011 (hereafter the October 1, 2011, amendment) applies only to eligible prisoners whose crimes were committed on or after that date, and such prospective-only application neither runs afoul of rules of statutory construction nor violates principles of equal protection. (*Ellis*, *supra*, at p. 1548.) In reaching that conclusion, we relied heavily on *Brown*, *supra*, 54 Cal.4th 314, in which the California Supreme Court held the amendment to section 4019 that became effective January 25, 2010 (hereafter the January 25, 2010, amendment) applied prospectively only. (*Brown*, *supra*, at p. 318; *Ellis*, *supra*, at p. 1550.)

Brown first examined rules of statutory construction. It observed that "[w]hether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent." (*Brown*, *supra*, 54 Cal.4th at p. 319.) Where the Legislature's intent is unclear, section 3 and cases construing its provisions require prospective-only application, unless it is "'very clear from extrinsic sources'" that the Legislature intended retroactive application. (*Brown*, *supra*, at p. 319.) The high court found no cause to apply the January 25, 2010, amendment retroactively as a matter of statutory construction. (*Id*. at pp. 320-322.)

Brown also examined *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), which held that when the Legislature amends a statute to reduce punishment for a particular criminal offense, courts will assume, absent evidence to the contrary, the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the

statute's operative date. (*Brown*, *supra*, 54 Cal.4th at p. 323; *Estrada*, *supra*, at pp. 742-748.) *Brown* concluded *Estrada* did not apply; former section 4019, as amended effective January 25, 2010, did not alter the penalty for any particular crime. (*Brown*, *supra*, at pp. 323-325, 328.) Rather than addressing punishment for past criminal conduct, *Brown* explained, section 4019 "addresses *future conduct* in a custodial setting by providing increased incentives for good behavior." (*Brown*, *supra*, at p. 325.)

In *Ellis*, we determined *Brown*'s reasoning and conclusions apply equally to current section 4019. Accordingly, we held the October 1, 2011, amendment does not apply retroactively as a matter of statutory construction or pursuant to *Estrada*. (*Ellis*, *supra*, 207 Cal.App.4th at pp. 1550, 1551.)

We next turned to the equal protection issue. (*Ellis*, *supra*, 207 Cal.App.4th at p. 1551.) In that regard, *Brown* held prospective-only application of the January 25, 2010, amendment did not violate either the federal or the state Constitution. (*Brown*, *supra*, 54 Cal.4th at p. 328.) *Brown* explained:

> "The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, '"[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner."' [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."' [Citation.]
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> "… [T]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. *That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows*." (*Brown*, *supra*, 54 Cal.4th at pp. 328-329, second italics added.)

The state high court rejected the argument that its decision in *People v. Sage* (1980) 26 Cal.3d 498 compelled a contrary conclusion, declining to read that case as

authority for more than it expressly held, namely that authorizing presentence conduct credit for misdemeanants who later served their sentences in county jail, but not for felons who ultimately were sentenced to state prison, violated equal protection. (*Brown*, *supra*, 54 Cal.4th at pp. 329-330; see *People v. Sage*, *supra*, 26 Cal.3d at p. 508.) It further refused to find the case before it controlled by *In re Kapperman* (1974) 11 Cal.3d 542, a case that, because it dealt with a statute granting credit for time served, not good conduct, was distinguishable. (*Brown*, *supra*, at p. 330.)

Once again, we found no reason in *Ellis* why "*Brown*'s conclusions and holding with respect to the January 25, 2010, amendment should not apply with equal force to the October 1, 2011, amendment. [Citation.]" (*Ellis*, *supra*, 207 Cal.App.4th at p. 1552.) Accordingly, we rejected the defendant's equal protection argument.[6]

Ellis is dispositive of defendant's claim of entitlement to enhanced credits. Defendant's presentence credits were properly calculated.

DISPOSITION

The judgment is affirmed.

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[6] *Ellis* also addressed, and rejected, the additional argument that the defendant nonetheless was entitled to enhanced conduct credits for the period between October 1, 2011, and the date he subsequently was sentenced. (*Ellis*, *supra*, 207 Cal.App.4th at pp. 1552-1553.) This portion of *Ellis* does not apply to the present case, since defendant was sentenced before the operative date of the October 1, 2011, amendment.